Supreme Court, U.S.
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No. 01-172

In the Supreme Court of the United States

BIOMET, INC.,

Petitioner,

v.

DR. RAYMOND G. TRONZO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations of every size, in every business sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of concern to American business. The Chamber's members have a strong interest in this case both because the Federal Circuit's inflexible application of the "mandate rule" creates an unfair trap for the unwary that is likely to ensnare all manner of future litigants and because, in the process of justifying its refusal to make a prudential exception to the mandate rule, the Federal Circuit eviscerated the guideposts established in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), for reviewing punitive damages awards for excessiveness.[1]

ARGUMENT

No one can deny that a grave injustice has been done in this case. If the judgment of the Federal Circuit is permitted to stand, petitioner will be mulcted to the breathtaking tune of $20 million for committing a tort that caused a mere $520 in damage to respondent. Petitioner is going to be subjected to this massive confiscation of property not because "a particularly egregious act has resulted in only a small amount

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[1] The parties have consented to the filing of this brief; the written consents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

of economic damages" (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)), but rather because of the combination of a crabbed application of the "mandate rule" and a cavalier application of the *BMW* guideposts in the context of a holding that a 99.99% reduction of the compensatory damages — from $7,134,000 to $520 — did not constitute a change of circumstances sufficient to justify departure from the mandate rule. Review is warranted both to ensure that the lower federal courts do not lose sight of their overriding obligation to avoid injustice when applying the mandate rule and other prudential doctrines and to prevent erosion of the *BMW* guideposts.

1. Although it is beyond peradventure that this Court does not sit simply to correct error, it is equally clear that the Court has an obligation to supervise the lower federal courts to ensure that they do not overstep their powers or otherwise become instruments of injustice.[2] That role is particularly important in an era of burgeoning litigation, in which appellate courts are tempted to cut corners in an effort to keep up with their case loads — invoking such doctrines as waiver, law of the case, and the mandate rule to pretermit consideration of issues on their merits.

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[2] *See, e.g., Caterpillar Inc. v. Lewis*, 519 U.S. 61, 67 (1996) (certiorari granted to review court of appeals' decision vacating a judgment entered after years of litigation and a six-day trial on account of a jurisdictional defect that had been cured by the time of trial); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570-571 (1979) (certiorari granted because of "[t]he departure by [the district court and court of appeals] from the procedure normally followed in addressing statutory and constitutional questions in the same case, as well as concern that the merits of these important questions had been decided erroneously"); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 340-342, 353 (1976) (certiorari granted to review court of appeals' refusal to grant mandamus in case that district court had "refused to adjudicate" and instead had remanded to state court "on grounds not authorized by the removal statutes"). *See generally* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 4.15, at 191-192 (7th ed. 1993).

The present case is a particularly egregious example of the exaltation of rigid formality over fundamental fairness. Confronted with stringent limits on the length of its appellate brief and an extraordinarily complex array of issues, petitioner made the judgment call in its first appeal not to waste precious space arguing that the punitive award, which then was only 2.8 times the compensatory damages, was unconstitutionally excessive.[3] Instead, it stated in footnotes that, in the event the Federal Circuit were to conclude that respondent had failed to prove damages, both the compensatory damages and the punitive damages should fall. *See* Pet. 6 (quoting from petitioner's opening and reply briefs in first appeal). Evidently having no inkling that a court would subsequently hold the preservation of contingent arguments to have been necessary, petitioner did not include in these footnotes the additional contention that, should the Federal Circuit conclude that some of respondent's claims could not stand and should it therefore remand for a redetermination of compensatory damages, it should also remand for a determination of whether the punitive damages had become unconstitutionally excessive in light of the reduced number of claims for which petitioner was legally liable and the reduced amount of compensatory damages.

Although the Federal Circuit's mandate — which "vacate[d] and remand[ed] for the district court to determine an appropriate award of damages in accordance with [the court's] opinion" (Pet. App. 46a) — would appear broad enough to

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[3] In making this point, we by no means intend to suggest that the existence of a low ratio necessarily immunizes a multimillion dollar punitive award from constitutional scrutiny. Our point is simply that petitioner should not be saddled with a manifestly unconstitutional punishment merely because it made a judgment call that, ***under the facts in existence at the time of the first appeal,*** its scarce space would be better devoted to arguments pertaining to liability and the amount of compensatory damages (which wound up resulting in the elimination of all but $520 of the original $7,134,00 in compensatory damages).

authorize the district court to evaluate the punitive damages for excessiveness in light of the dramatically reduced compensatory award, the Federal Circuit held that petitioner waived any right to challenge the amount of punitive damages by failing expressly to ask for the punitive damages to be vacated and remanded in the event the compensatory damages were vacated and remanded. "Because Biomet failed to raise this issue," the court held, "our mandate in *Tronzo I* acted to prevent Biomet from raising this issue on remand or in any future proceedings in this litigation." *Id.* at 11a.

In short, the Federal Circuit held that petitioner's failure to foretell with a seer's prescience all possible contingencies (and to squeeze all of those contingencies into a brief of restricted length) was a waiver that then became embedded in cement by virtue of the mandate rule.[4] In so doing, it left standing a punitive award that no one conceivably could believe to be constitutional after *BMW* and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001) — one that is more than 380 times the amount that the district court believed to be the constitutional maximum.

Without intending any disrespect for the Federal Circuit, this kind of wooden application of waiver principles and the

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[4] Notably, the Federal Circuit cited no authority for the proposition that contingent issues must be raised before they have ripened on pain of being denied the right to raise them if and when they ever do ripen. Instead, it concluded that, because Biomet challenged the punitive damages in its post-verdict motions, nothing prevented it from challenging them on appeal. Pet. App. 10a-11a. This rationale erroneously conflates two different arguments. The argument made in post-trial motions was that, even though they were less than three times the compensatory damages, the punitive damages were excessive. Biomet elected not to raise that argument on appeal and hence undeniably waived it. But that argument is materially different from an argument that a punitive award that is over 38,000 times the compensatory damages is unconstitutionally excessive. The latter argument plainly was not ripe until after the compensatory damages were reduced on remand.

mandate rule is utterly irreconcilable with the obligation of the federal courts to do justice. Review is warranted to remind the courts of appeals of this Court's long-standing teaching that the mandate rule (and like prudential doctrines) must not be applied "***in a manner to cause injustice.***" *Story v. Livingston*, 38 U.S. (13 Pet.) 359, 373 (1839) (emphasis added).

2. The Federal Circuit acknowledged, as it had to, that the mandate rule is not "an unassailable limit on an appellate court's jurisdiction" and that "a substantial change in the evidence" could justify "revisiting issues otherwise foreclosed." Pet. App. 12a-13a. Astonishingly, however, the court did not regard a 99.99% reduction of the compensatory damages to constitute a sufficiently "substantial" change. The court was able to reach that surprising conclusion only by misapplying (if not outright defying) the *BMW* guideposts in a manner that threatens to render *BMW* a dead letter in the Federal Circuit and create problematic precedent elsewhere.

As its principal justification for refusing to regard a 99.99% reduction of the compensatory damages as a substantial change, the Federal Circuit stated that the most important guidepost is the degree of reprehensibility of the conduct (Pet. App. 13a-14a) and observed that "Biomet never challenged on appeal the jury's finding of wanton or willful conduct in support of punitive damages liability" (*id.* at 14a). The suggestion that conduct that was sufficient to clear the threshold for imposition of punitive damages is also sufficient to justify a $20 million exaction that is more than 38,000 times the compensatory damages simply cannot be squared with *BMW*. In that case, the defendant did not and could not challenge in this Court the jury's finding that its conduct was "'gross, oppressive or malicious'" (*BMW*, 517 U.S. at 565) and hence subject to punitive damages. Nevertheless, this Court held: "That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish

the high degree of culpability that warrants a substantial punitive damages award." *Id.* at 580. Because the record disclosed "none of the aggravating factors associated with particularly reprehensible conduct" (*id.* at 576), the Court was "persuaded that BMW's conduct was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award" (*id.* at 580). The Federal Circuit's reliance on the jury's finding of the conduct necessary for the imposition of punitive damages — and nothing more — is an egregious departure from *BMW* that should be swiftly renounced before it takes hold elsewhere.

As a second justification for declining to find the 1,373,526% increase in the ratio of punitive to compensatory damages to be a substantial change, the Federal Circuit stated that "there is a strong suggestion in the record that the potential compensatory damages may have been much higher than what was actually awarded." Pet. App. 14a. The Federal Circuit's reliance on "potential harm" is utterly misplaced and cannot be squared with this Court's treatment of the concept in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), *BMW*, and *Cooper*.

Most fundamentally, this Court consistently has used the term "potential harm" to refer to harm that was intended by the defendant but fortuitously did not occur.[5] The Federal Circuit

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[5] *See, e.g., Cooper*, 121 S. Ct. at 1688 ("In evaluating the second *Gore* factor, the ratio between the size of the award of punitive damages and the harm caused by Cooper's tortious conduct, the District Court might have been influenced by respondent's submission that it was not the actual injury — which the jury assessed at $50,000 — that was relevant but rather 'the potential harm Leatherman would have suffered had Cooper succeeded in its wrongful conduct.'") (quoting Brief for Respondent at 7); *BMW*, 517 U.S. at 581 ("in upholding the $10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded"); *TXO*, 509 U.S. at 460 ("It is appropriate to consider the magnitude of the potential harm that the

turned the concept upside down and inside out by using it as a justification to hypothesize the existence of injury that may have occurred but that respondent's counsel elected for "strategic" reasons not to attempt to prove. *See* Pet. App. 14a ("competent evidence of damages may have existed, but was never introduced"). The fact that respondent could potentially have proven more damages than it did does not mean that the case involves potential, but unrealized, harm.

Relatedly, as petitioner explains (Pet. 25), it is clear from *TXO* that courts may factor potential harm into the analysis only if there is ***evidence*** of the existence and amount of such harm in the record. As Justice Kennedy succinctly put it: "It is a commonplace that a jury verdict must be reviewed in relation to the record before it." *TXO,* 509 U.S. at 468 (Kennedy, J., concurring). Here, it is undeniable that "competent evidence of damages" beyond $520 — whether actual or potential — "was never introduced." Pet. App. 14a.

Finally, this Court and others have emphasized that, to be considered, potential harm has to have been ***likely*** to have occurred.[6] In part because there was no evidence of potential

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defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded * * *.") (plurality op.) (emphasis deleted); *id.* at 462 ("While petitioner stresses the shocking disparity between the punitive award and the compensatory award, that shock dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme.").

[6] *See, e.g., BMW,* 517 U.S. at 581 (*TXO* confirmed that "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred") (emphasis in original; internal quotation marks omitted); *Pulla v. Amoco Oil Co,* 72 F.3d 648, 659 (8th Cir.1995) (Justice White, sitting by designation) ("Under this standard, the touchstone is the potential harm that would have likely resulted from the dangerousness inherent in defendant's actual conduct."); *id.* at 659 n.17 ("The [*TXO*] Court further underscored its commitment to the fact that the

harm (or actual harm beyond $520) in the record at all, the Federal Circuit's reliance on the concept of potential harm to avoid the conclusion that the 99.99% reduction of the compensatory damages was a substantial change squarely conflicts with *TXO* and its progeny.

If adopted by other courts, the Federal Circuit's misapplication of the potential harm concept would have highly deleterious consequences. It not only would justify upholding virtually any punitive award, but it also would encourage sandbagging — the holding back of evidence of damages in the expectation of invoking such unproven (and, for all anyone knows, entirely fictive) damages as justification for an otherwise unsustainable punitive award. That is neither fair to defendants nor sensible policy for the federal courts. Review is warranted to bring the Federal Circuit back into line with this Court's punitive damages precedents.

CONCLUSION

The petition for certiorari should be granted.

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potential harm must be 'likely,' by highlighting that West Virginia similarly imposes a likelihood requirement."); *Bell Atlantic Network Servs., Inc. v. P.M. Video Corp.*, 730 A.2d 406, 431 (N.J. Super. Ct. App. Div. 1999) (trial court correctly excluded evidence of alleged lost profits in trial limited to amount of punitive damages because, "[a]lthough that vast sum of money might be described as reflecting the potential harm to the plaintiff, it is not a harm that occurred and it is not a harm that was likely to result from the fraud.").

Respectfully submitted.

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